SAM HIN TIMBER TRADING CO.

v.

PERUSAHAAN SRI DUYONG SDN. BHD.

HIGH COURT MALAYA, SEREMBAN
PEH SWEE CHIN J
[COMPANIES WINDING-UP NO. 2 OF 1983]
11 OCTOBER 1983

COMPANY LAW: *Winding Up - Presentation of petition - Affidavit verifying petition affirmed before presentation - Breach of r. 26, Companies (Winding-Up) Rules - Application for extension of time for affidavit to be re-affirmed or re-sworn - Whether disposal of application should be in open Court - Whether petition should be withdrawn - Discretion of Court.*

A petition for the winding-up of Perusahaan Sri Duyong Sdn. Bhd. (the company) was presented on 24 March 1983 but the affidavit verifying the petition was affirmed on 8 March 1983. This was non-compliance of r. 26 of the Companies (Winding-Up) Rules 1972 (the Rules). An application was made by the petitioner for extension of time for filing such affidavit, that is for leave to re-affirm and re-swear the same affidavit. The company opposed the application.

Held:

[1] The Court had power to extend the time asked for under r. 193 and r. 194 of the Rules. The premature swearing or affirming of such an affidavit is a mere irregularity curable by granting an extension of time and compensating the victim with costs. Rule 193 confers a discretion on the Court to allow extension of time. (*Chin Yoon Timber Co. v. Overseas Lumber Bhd.* [1978] 2 MLJ 173 distinguished; *Re Western Benefit Building Society* 55 ER 409).

[2] There was no substance in the second issue raised by the company, that the application should be disposed of in open Court. Rule 5(2) of the Rules provides for any other matter other than those matters (not including extension of time) enumerated in r. 5(1) which are to be disposed of in chambers. These special provisions should prevail over the general words of r. 7(1) which is contradicted by r. 7(2), which provides for applications in chambers.

[Application allowed.]

Cases referred to:
Chin Yoon Timber Co. v. Overseas Lumber Bhd. [1978] 2 MLJ 173
Re Western Benefit Building Society 55 ER 409

Legislation referred to:
Companies (Winding-Up) Rules 1972, rr. 5 (1), (2), 7 (1), (2), 26, 193, 194

For the petitioner - Lutfiah Ismail; M/s. Ismail Brothers & Co.
For the respondent - Gurdial Bakan Singh; M/s. Gurdial Bakan Singh

JUDGMENT

Peh Swee Chin J:

A petition for the winding-up of Perusahaan Sri Duyong Sdn. Bhd. (the company) was presented or filed on 24 March 1983 in this Court but the affidavit verifying the petition was affirmed on 8 March 1983, i.e. before the presentation of the petition itself, a clear failure to comply with r. 26 of the Companies (Winding-Up) Rules 1972.

A director of the company raised an objection to the petition by filing an affidavit made on 15 July 1983. Apparently the mistake was thus realised by the petitioners who then filed a summons-in-chambers on 30 July 1983 asking for extension of time for affirming and filing such affidavit i.e. for leave to re-affirm or re-swear the same affidavit. After hearing arguments of Counsel, I upheld the objection of the learned Counsel for the company about the prior or premature affirmation of the affidavit dated 8 March 1983 but exercised my discretion to allow the petitioners to re-affirm or re-swear the same affidavit within ten days with costs to the company. From this order, the company has now appealed.

Dilatoriness of judicial proceedings so much misunderstood by the public and an almost perennial subject of their adverse criticism has again become inevitable in this case. Opposing the application for extension of time to re-swear the affidavit, learned Counsel took two issues; first that the very application should be disposed of in open Court instead of chambers and secondly, on the authority of *Chin Yoon Timber Co. v. Overseas Lumber Bhd.* [1978] 2 MLJ 173 the petition verified by an affidavit made before its presentation, should be withdrawn by the petitioners and a fresh one be filed.

Learned Counsel for the petitioners submitted that since the only objection was as to the time of affirming the affidavit, there was therefore no injustice caused to the company. She referred to r. 193 and 194 of the Rules. She also referred to r. 7(2) for making the application in chambers.

There can be no doubt that this Court has the power to extend the time asked for in this case for r. 193 provides:

> 193. The Court may, in any cause in which it shall see fit extend or abridge the time appointed by these Rules or fixed by any order of the Court for doing any act or taking any proceeding.

Further r. 194 provides:

> 194. (1) No proceedings under the Act or the Rules shall be invalidated by any formal defect or any irregularity, unless the Court is of the opinion that substantial injustice has been caused by the defect or irregularity, and that the injustice cannot be remedied by any order of the Court.
>
> (2) No defect or irregularity in the appointment or election of a receiver, liquidator, or member of a receiver, liquidator, or member of a committee of inspection shall vitiate any act done by him in good faith.

In my view, the premature swearing or affirming of such an affidavit is a mere irregularity curable by granting an extension of time under r. 193 and compensating the victim of the irregularity with costs, because the company could not have been misled in any way, neither was there any real prejudice caused to the company. I could not find anything that could even remotely resemble any form of injustice to the company. Rule 193 no doubt, confers, from its wording, a discretion such that an applicant for extension of time is not bound to succeed as a matter of right. Here the applicant had filed an application, laying all the facts

not lacking in candour before the Court, bearing in mind also the well known dictum that rules should be a handmaid rather than the mistress and the fact, that there has always been an old and inveterate practice among solicitors for calling upon their clients to sign or swear documents, before filing them, a practice though very convenient, sometimes lands themselves in a great deal of inconvenience.

In the case of the *Chin Yoon Timber Co.* cited by Counsel, the learned Judge exercised his discretion, in not allowing an extension of time, because, *inter alia*, the learned Judge appears to have taken a dim view of the petitioners there filing a second affidavit without applying for leave beforehand, during an adjournment expressly granted to enable parties to look up authorities to deal with the objection of premature swearing of a similar affidavit, and making an oral application also in the middle of re-arguments, for extension of time in order to validate apparently the second affidavits, without any explanation. What the petitioners had done there in filing a second affidavit in advance of re-arguments and the Court's judgment would appear to be an act of considerable discourtesy to his Lordship there, and an oral application not therefore supported by any affidavit setting out the reasons for the application, would not be appropriate in the circumstances of that case.

In *Re Western Benefit Building Society* 55 ER 409 in a very short judgment, the learned Master of the Rolls held that the affidavit amounted to nothing and must be re-sworn. Re-swearing of the affidavit must have been therefore the order made therein, and I also made a similar order.

On Counsel's second issue about the application for extension of time being disposed of in chambers instead of open Court; under r. 5(1) of the Rules, six matters are enumerated therein as matters to be dealt with in open Court; and application for extension of time is not among them. Rule 5(2) provides for every other matter to be disposed of in chambers. These special provisions should not be impaired by and they should prevail over the general words in r. 7(1), *generalia specialibus non derogant*. Again, r. 7(2) contradicts r. 7(1) by the clearest possible implication, by providing for applications in chambers. I therefore suspect that the framers could have inadvertently left out the "which" to precede immediately the words "shall be made by motion ..." in r. 7(1). I found therefore no substance in the second issue raised by the company.

For the reasons stated above, I exercised my discretion to allow extension of time asked for by the petitioners.

Also found at [1983] 2 CLJ 269